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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. [redacted]

GERALD ROJAS, SR.
Petitioner

vs

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BARRY A. COHEN, P.A.
100 Twiggs Street
Suite 4000
Tampa, Florida 33602

and

PAUL ANTINORI, JR. of
ANTINORI & THURY, P.A.
601 East Twiggs Street
Tampa, Florida 33602

Attorneys for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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IN THE

Supreme Court of the United States

NO. 75-3760

GERALD ROJAS, SR.
Petitioner

vs

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Gerald Rojas, Sr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which opinion was rendered on August 20, 1976, and Petition for Rehearing was denied on October 1, 1976.

OPINION BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 537 F.2d 216, attached hereto and incorporated herein. (Appendix 1).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1976. The Petition for Rehearing was denied on October 1, 1976. (Appendix 2)

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19(b) of the Supreme Court of the United States.

QUESTION PRESENTED

Whether the perfunctory voir dire of prospective jurors, failure to inquire into germane matters of attitude, coupled with the Court's demeanor during voir dire, deprived Petitioner of his right to a fair trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution.

CONCISE STATEMENT OF THE CASE CONCERNING FACTS MATERIAL TO QUESTION PRESENTED

The Federal Grand Jury, for the Middle District of Florida, indicted the Petitioner in a four count indictment, charging the Petitioner, Gerald Rojas, Sr., in two counts, to-wit: in Count One with violation of Title 21, United States Code, Section 841(a)(1) and Section 846; and in Count Four with violation of Title 21, United States Code, Section 841(a)(2) and Title 18, United States Code, Section 2. (Appendix 3)

The trial commenced in the Middle District of Florida before the Honorable Daniel Thomas, visiting Judge by designation from Alabama, and concluded on July 17, 1975, with a finding by the jury that Petitioner was guilty of both Count One and Count Four. The Petitioner was sentenced to a term of ten (10) years.

A Motion for New Trial was timely filed and denied. Petitioner appealed to the Fifth Circuit Court of Appeals, which was denied; as was the Petition for Rehearing.

In compliance with Rule 23(1)(e) of the Supreme Court of The United States, the following is submitted to this Court.

The Trial Judge, sitting in the Middle District of Florida, Tampa Division, by designation from the Southern District of Alabama, during a pre-trial conference the day before the trial, expressed the opinion that he "did not like the way we chose jurors in this District because it took too much time". Consistent with this opinion, when voir dire commenced, the trial Court conducting the voir dire, having denied defense counsel's motion to allow counsel to voir dire, addressed the panel very generally, hurriedly and perfunctorily.

During the jury selection process the Court, while pacing back and forth behind the bench, admonished defense counsel in the hearing presence of the jury to "let's get this jury hurried up now". When the trial Court told defense counsel the second time in a somewhat "meaningful" way, "let's get this jury hurried up now" defense counsel felt compelled to comply with the order and thus immediately, but reluctantly accepted the panel.

The Court, in the manner above described, asked nine general questions of the panel and then immediately specifically asked each juror his name, address, employment, marital status and employment of spouse. The Court refused to substantially comply with the Petitioner's requested questions submitted in writing, and significantly refused the following specific questions:

1. "41. Do you believe that merely because one is a law enforcement officer he will always tell the truth, or do you believe that he may intentionally mis-represent something, exag-

gerate or not disclose when there is a duty to disclose, like any other witness who may not want to be completely accurate?"

2a. "63. Will you be able to give one charged with a drug related offense, the presumption of innocence?

2b. 64. State your feelings concerning persons charged with drug related crimes.

2c. 65. Have you or any members of your immediate family or close friends ever been arrested or accused of any drug related offense? If so, Pursue."

Bobby Hornsby of Brandon, Florida, became the foreman of the jury and it was subsequently learned that the said foreman helped organize a project known as Reach Out Crisis Center, which organization was to help people on drugs. Mr. Hornsby served on the Advisory Board and Board of Directors of the organization. Mr. Hornsby has sworn, by way of affidavit, that had he been asked questions concerning his feelings toward drugs and other related type questions, he would have expressed his attitude concerning the same which would have allowed the Petitioner the opportunity to exercise a peremptory challenge.

REASONS FOR GRANTING THE WRIT

The Opinion of the Fifth Circuit Court of Appeals in the case sub judice is in conflict with decisions of this Court, Federal Appellate Courts and State Courts on the federal question of substance.

This case presents an unfortunate situation in the life of the Petitioner in that as a citizen of the United States, he was denied his constitutional right to a fair

and impartial trial and thus he was denied due process of law. If this matter is not corrected by this Court, he will be ordered to the Federal Penitentiary for a period of ten (10) years consistent with the order of the trial Court.

This case is as important to the American system of criminal justice as it is to Gerald Rojas, Sr., but for different reasons. It is important to Gerald Rojas, Sr., because his freedom is in jeopardy. It is important to the criminal justice system because the necessity to review the entire voir dire process within the Federal judiciary is overdue.

The hurried and perfunctory procedure manifested in this case by the trial Court illustrates a very real problem in the Federal judiciary. Because of insurmountable work loads, Courts, as the trial Court at bar, attempt to expedite and accelerate the process resulting in a denial of due process of law.

This Court has long recognized the principle of law that the trial Court "while impaneling a jury has a serious duty to determine questions of actual bias and a broad discretion in its rulings on challenges therefor, and, in exercising its discretion, trial court must be zealous to protect the rights of an accused"[1] and further that the "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury".[2]

This Court recently recognized the principle of law in *Ristaino v Ross*, 96 S.Ct. 1017 (1976) that demeanor

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1 Dennis v United States, 70 S.Ct. 519

2 Morford v United States, 70 S.Ct. 586

is an important part of determining impartiality. Further, this Court has long recognized the principle of law that the peremptory challenge is one of the most important rights secured to the accused. *Pointer v United States,* 14 S.Ct. 410. Once again, this Court in examining the voir dire process in *Swain v State of Alabama,* 85 S.Ct. 824, 835, stated:

> "Although '(t)here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges,' nonetheless the challenge is 'one of the most important of the rights secured to the accused.' The denial or impairment of the right is reversible error without a showing of prejudice."

The limited number of voir dire questions submitted by the Court, coupled with them calling for a yes or no response, makes meaningful the insignificance of the Court's question, "is there any reason you cannot be fair and impartial?"

The Seventh Circuit Court of Appeals in *United States v Dellinger,* 472 F.2d 340 (1972) stated:

> "The general question to veniremen whether there is any reason they cannot be fair and impartial, cannot be relied on to produce a disclosure of any disqualifying state of mind."

and furthermore, the Court pointed out that:

> ". . . it is not necessary for defendants to show that members of the jury were in fact prejudiced. The focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." (P. 367).

The refusal of the trial Court to ask any question concerning the nature of the offense, either as submitted or in the Court's own discretion, prohibited the Petitioner from learning about the state of mind of the prospective jurors concerning such an allegation and what attitudes they may have concerning the issues in the case.

In *Conrad v Louisiana,* 304 So.2d 318, when the trial Court refused to ask defense counsel's question:

> "Gentlemen, we have a serious drug problem in this state, in this country. (1) Will that and the fact that this is a drug case in any way affect your impartial judgment in this case? (2) Do you feel that a person charged with possession of a large quantity of Marijuana, for example, should satisfy you as to her innocence?" (numbers supplied).

the Supreme Court of Louisiana stated:

> "We hold that the trial court's disallowance of the above-quoted questions which defendant sought to ask prospective jurors constitutes curtailment of voir dire examination . . ." (P. 319).

The refusal to make an inquiry with reference to the credibility of the law enforcement officer as stated in paragraph 41 of the questions requested by Petitioner set forth in the specific questions quoted in the facts herein was dealt with by Justice Burger in *Brown v United States,* 338 F.2d 543 (1964), when, in examining the trial court's refusal to ask of the prospective juror, "Would you give greater credence to testimony of law enforcement officer merely because he was an officer as compared to any other witness.", held:

> "Although the trial court possesses a 'broad discretion as to the questions to be asked' on voir dire,

> the exercise of that discretion is 'subject to the essential demands of fairness'."[3]

Justice Burger concluded that the failure to ask such a question departed from the essential demands of fairness and reversed the conviction.

As busy as Courts are, our system of criminal justice should not and cannot tolerate rationalizing due process principles in the name of judicial expediency. There are other forums and ways to correct the administrative problems of the Courts, and this Court above all must be vigilant in insuring that constitutional principles are not diluted as part payment for "expediting the process".

It is submitted to this Court that perhaps more particular guidelines are needed to insure fairness during the voir dire process so that lower Courts are

[3] Cites *Aldridge v United States*, 51 S.Ct. 470, and relies on *Sellers v United States*, 271 F.2d 475.

not encouraged under the authority of "broad discretion" to conduct a voir dire examination as was present in this cause.

Respectfully submitted,

BARRY A. COHEN, P.A.
100 Twiggs Street
Suite 4000
Tampa, Florida 33602

BARRY A. COHEN

and

ANTINORI & THURY, P.A.
601 East Twiggs Street
Tampa, Florida 33602

PAUL ANTINORI, JR.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 33 of the Rules of this Court, on the day of October, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, and three additional copies were mailed to United States Attorney, Federal Building, Tampa, Florida. I further certify that all parties required to be served have been served.

PAUL ANTINORI, JR.

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Gerald ROJAS, Sr.,
Defendant-Appellant.**

No. 75-3760.

United States Court of Appeals,
Fifth Circuit.

Aug. 20, 1976.

Defendant was convicted before the United States District Court for the Middle District of Florida, Daniel Holcombe Thomas, J., sitting by designation, of possession of a controlled substance with intent to distribute and of conspiracy to possess cocaine with intent to distribute, and he appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that district court's refusal to ask prospective jurors on voir dire to state their feelings concerning persons charged with drug-related crimes was not abuse of discretion, that requested instruction that defendant's mere physical proximity to cocaine hidden in the common room of house which he occupied was insufficient to establish the element of possession was properly refused in view of instructions given, that evidence was sufficient to support conviction and that although police officer's testimony that defendant was the only occupant whom the police had information on as selling cocaine smacked of "informant's hearsay," trial court's admonition to jury to "Disregard that remark," was sufficient to obviate need to declare a mistrial.

Affirmed.

1. Jury ⇐131(2)

Scope of voir dire is committed to the sound discretion of the trial judge, who may choose to ask counsel to submit proposed questions and conduct the voir dire itself. Fed.Rules Crim.Proc. rule 24(a), 18 U.S.C.A.

2. Jury ⇐131(6)

District court's refusal to ask prospective jurors on voir dire to state their feelings concerning persons charged with drug related crimes, rather than relying on careful though general questions pertaining to possibility of bias was not abuse of discretion and did not effect essential fairness, notwithstanding that, following trial, one juror stated that he had helped organize and had served on organization that was designed to help people on drugs. Fed.Rules Crim.Proc. rule 24(a), 18 U.S.C.A.

3. Drugs and Narcotics ⇐123

A defendant's mere presence in an area where narcotics are discovered is insufficient evidence to support a conviction for possession. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

4. Criminal Law ⇐829(3)

Requested instruction that defendant's mere physical proximity to cocaine hidden in the common room of residence was insufficient to establish element of possession was properly refused in view of instructions given, which instructions stated that in order to find possession the jury must find that defendant had either direct physical control or the power and intention to exercise dominion or control over the cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

5. Criminal Law ⇐1144.13(3)

In considering argument that evidence was insufficient to support conviction the Court of Appeals must take the view of the evidence most favorable to the Government.

6. Criminal Law ⇐552(3), 562

Test for sufficiency of the evidence, whether it be circumstantial or direct, is whether reasonable jurors could find the evidence inconsistent with every hypothesis of innocence.

7. Conspiracy ⇐44½

In view of frequency of drug transactions, i. e., three sales in four days, as well as the amounts of the cocaine involved, i. e., some two and one-half ounces being sold and an additional seven ounces found in defendant's home, the jury, in prosecution for conspiracy to possess cocaine with intent to distribute, was free to infer defendant's knowledge and intent that the cocaine which he delivered to his nephew, for transfer to undercover agents, would be redistributed; in such circumstances it was immaterial that defendant did not know the identity of lower links in the chain of distribution. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

8. Criminal Law ⇐867

Although police detective's testimony, in response to question whether officer had determined who occupied subject house, that defendant was the only one at the residence whom the police had information on as selling narcotics smacked of "informant's hearsay" trial court's admonition, "Disregard that remark," was sufficient to obviate the need to declare a mistrial, especially since such statement could not have a substantial impact on the verdict in that other evidence clearly pointed to defendant as being a large-volume supplier of cocaine and attention of jury was not again directed to the remark. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

9. Criminal Law ⇐1169.5(1)

General rule is that striking erroneously admitted evidence and admonishing the jury to disregard it serves to cure the error.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM and MORGAN, Circuit Judges, and LYNNE, District Judge.

LEWIS R. MORGAN, Circuit Judge:

Appellant Gerald Rojas, Sr. was convicted of possession of a controlled substance, cocaine, with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. He assigns four grounds as error requiring reversal. We affirm.

I. *Facts.*

Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the jury could have found the following: On February 8, 1975, two Tampa, Florida undercover police detectives, Hartzner and Larson, met Stephen Charles Alfonso to attempt to purchase narcotics from him. Although no narcotics transaction occurred that day, Alfonso sold some counterfeit money to the detectives and arranged to meet them again at a predetermined street intersection on February 12.

At about 11:00 p. m. February 12, Hartzner, Larson, and Alfonso met as planned. The detectives asked whether Alfonso could supply them with cocaine, whereupon he left for about fifteen minutes and returned with a small sample of the drug. The three agreed to meet at the same place at 1:00 a. m. February 13 in order to complete the sale of half an ounce of cocaine for $625.

Hartzner and Larson met Alfonso, who was accompanied by appellant's nephew Richard "Chicky" Valdez, as scheduled. The detectives delivered $625 and Alfonso and Valdez delivered one quarter ounce of cocaine, directing the detectives to follow them to a new location for delivery of the other quarter ounce. This new location was two to four blocks from the house at 3010 West Laurel Street in Tampa where appellant, his wife Melba, and his stepson Jose Garcia lived. When the four met at the new location Valdez left in an automobile with the money, returned about five minutes later, and delivered the second quarter ounce.

The detectives next met Alfonso at his residence about 6:40 p. m. February 15, at which time they discussed with him the purchase of a full ounce of cocaine. Alfonso told the detectives that he would have to check to see whether he could procure an ounce and that the detectives should meet him at a shopping center at 8:00 p. m. that evening. Alfonso then contacted Valdez, and at about 8:00 p. m. the two of them drove to the house at 3010 West Laurel Street, which Valdez identified to Alfonso as his source's house. Valdez went inside the house alone, returned a few minutes later, and told Alfonso that "the old man" was taking a shower and that they should return later. Alfonso and Valdez then met the detectives, told them that their source was taking a shower, and agreed to meet later at Alfonso's residence.

Alfonso and Valdez returned to the house at 3010 West Laurel Street. Valdez again went inside alone, returning a few minutes later with a quantity of cocaine. At about 9:30 p. m. Alfonso and Valdez met Hartzner and Larson at Alfonso's residence, where the detectives delivered $1,200 and were given an ounce of cocaine. Valdez then left to return some extra cocaine to his source and was followed by a police surveillance team back to the house at 3010 West Laurel Street.

Later the same night Ernest Spencer, an informant for the State Attorney's office at Gainesville, went to Valdez' residence with two other persons to negotiate for the purchase of some cocaine. At about 1:00 a. m. the next morning, February 16, Valdez, Spencer, and the others drove to the house at 3010 West Laurel Street. Valdez went inside alone, spoke with someone in the house, returned to the car, and announced that his "uncle's got plenty of coke but he's just to [sic] plum out tonight to do any business." Later the same morning appellant Rojas met Valdez, Spencer, and the others at Valdez' residence. There Rojas personally delivered an ounce of cocaine to Spencer's companions in return for $1,100. At this time the five men discussed the possibility of further transactions for a pound or more of cocaine, with Valdez repeatedly stating that, "My uncle don't sell no bad drugs."

On February 21 a team of law enforcement officers executed a search warrant on the house at 3010 West Laurel Street. There, concealed under the seat of a lounge chair in the "Florida" or living room, they discovered a bag containing seven ounces of cocaine. They also found a set of scales of a kind suit-

able for weighing drugs in Rojas' and his wife's bedroom and a quantity of marijuana in the stepson's bedroom. After the search, as Detective Hartzner was about to leave the house carrying the cocaine, appellant asked him whether he could leave "half the stash." Hartzner declined.

A federal grand jury indicted appellant, Alfonso, and Valdez on February 27, 1975. On February 28 Alfonso pleaded guilty to conspiracy to possess cocaine with intent to distribute. Valdez' case was severed from appellant's, and Valdez was convicted on the same charge July 8, 1975.

Appellant's trial began July 15. The principal witnesses for the government were Hartzner, Alfonso, and Spencer; Valdez did not testify. A government expert testified that chemical analysis of four cocaine samples—the two quarter ounces purchased February 13, the ounce purchased February 15, and the seven ounces seized in the search February 21—revealed such a similar and unusual combination of cocaine and other substances that there was a "high degree of probability" that the four samples once had been part of a single mixture. Appellant presented evidence of an alibi for the evening of February 15. The jury retired for deliberation on the afternoon of July 17 and returned its verdict of guilty on both counts two hours later. Appellant was sentenced to concurrent ten-year terms, plus the mandatory special parole term.

II. *Voir Dire.*

[1, 2] Appellant's first assignment of error complains of the district court's refusal to ask prospective jurors on the voir dire to state their feelings concerning persons charged with drug related crimes. Appellant filed, together with his new trial motion, an affidavit of the jury foreman, Bobby Hornsby, which stated that Hornsby had helped organize and had served on an organization called the Reach Out Crisis Center, the purpose of which "was to help people on drugs as well as other social type difficulties." The affidavit further stated that if appellant's requested voir dire question had been asked, Hornsby would have made known his activities with this organization. Appellant's counsel state that if this information had been elicited, they would have excused this juror.

The district court may, of course, choose to ask counsel to submit proposed questions and conduct the voir dire itself. Fed.R.Crim.Pro. 24(a). The scope of the voir dire is committed to the sound discretion of the trial judge, *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); *United States v. Gassaway*, 456 F.2d 624, 626 (5th Cir. 1972), "subject to the essential demands of fairness," *Aldridge v. United States*, 283 U.S. 308, 310, 51 S.Ct. 470–471, 75 L.Ed. 1054 (1931). The experienced trial judge in this case, after inquiring into the prospective jurors' and their families' acquaintances with the defendant and counsel and into their familiarity with the case from news reports, asked all prospective jurors whether they knew of any other reason why they could not give both the government and the defendant a fair and impartial trial. Hornsby did not state that he knew of any such reason. His post-trial affidavit does not state that he was prejudiced in any way.

Here, as in *United States v. Eastwood*, 489 F.2d 818 (5th Cir. 1973), the district court declined to ask prospective jurors specific questions regarding their feelings about or experiences with drugs or drugs users, but instead relied on "careful though general questions pertaining to the possibility of bias." *Id.* at 820. Here, as in *Eastland*, we think this course did not affect the essential fairness of appellant's trial and hence did not constitute an abuse of discretion. *See also United States v. Goodwin*, 470 F.2d 893, 897–98 (5th Cir. 1972), *cert. denied*, 411 U.S. 969, 93 S.Ct. 2160, 36 L.Ed.2d 691 (1973); *United States v. Gassaway, supra*, 456 F.2d at 625–26.

III. *Instruction on Possession.*

[3, 4] Appellant next argues that, in view of the fact that he shared occupancy with two other persons, the district court erred in refusing to give his requested jury instruction that his mere physical proximity to cocaine hidden in a common room of the house was insufficient to establish the element of possession, either actual or constructive.[1] It is true that a defendant's mere presence in an area where narcotics are discovered is insufficient evidence to support a conviction for possession. *United States v. Ferg*, 504 F.2d 914, 916–17 (5th Cir. 1974); *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973). Nonetheless, the charge given by the district court was sufficient, if followed, to preclude conviction for mere presence or proximity. The instruction correctly stated that in order to find possession, the jury must find that the defendant had either direct physical control or the power and intention to exercise dominion or control over the cocaine.[2] *United States v. Ferg, supra*, 504 F.2d at 916–17; *United States v. Stephenson, supra*, 474 F.2d at 1355. The instruction was in terms nearly identical to that given in *United States v. Gloria*, 494 F.2d 477, 483 (5th Cir.), *cert. denied*, 419 U.S. 995, 95 S.Ct. 306, 42 L.Ed.2d 267 (1974), which we upheld against the same objection. We hold there was no error in refusing the tendered instruction.

1. The instruction refused by the district court stated:

> In order to establish constructive possession the government must prove evidence showing ownership, dominion, or control of the contraband itself or the premises in which the contraband is concealed.
>
> In other words, there must be some nexus between the accused and the prohibited substance. Proof of physical proximity to controlled drugs is not sufficient to establish either actual or constructive possession. Mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession.
>
> Where premises are not in the exclusive possession of the defendant, the government, in order to prove knowledge of presence of drugs, must present other evidence showing knowledge of the existence of the drugs and an exercise of dominion and control over the drugs beyond a reasonable doubt[.]

Appendix at 11–12.

2. The instruction actually given by the district court stated:

> The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
>
> A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.
>
> The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
>
> You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

Record Vol. II at 662–63.

IV. *Sufficiency of the Evidence.*

[5, 6] Appellant's next contention is that the evidence was insufficient to support a conviction on either the possession or the conspiracy count. In considering this argument we must take the view of the evidence most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The test for sufficiency, whether the evidence relied upon by the government be direct or circumstantial, is whether reasonable jurors could find the evidence inconsistent with every hypothesis of innocence. *United States v. Moore*, 505 F.2d 620, 623 (5th Cir. 1974), *cert. denied*, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975); *United States v. Nazien*, 504 F.2d 394, 395 (5th Cir. 1974), *cert. denied*, 420 U.S. 964, 95 S.Ct. 1358, 43 L.Ed.2d 443 (1975). Having reviewed the record carefully, we hold there was ample evidence to support convictions on both counts.

With respect to the possession count, the jury could reasonably have concluded that the government proved appellant exercised the requisite dominion and control over the cocaine found under the chair. *See United States v. Ferg, supra*, 504 F.2d at 916–17; *United States v. Stephenson, supra*, 474 F.2d at 1355. Alfonso testified that although he himself never met appellant, Valdez had referred to "the old man" at the house as the source of the cocaine that they procured there on February 15. Appellant is nearly fifty years old, while the only other male living at the house, his stepson, was described as being in his early twenties; thus the jury could reasonably have found that Valdez referred to appellant and not his stepson as the source of the cocaine supplied on February 15. As the government's expert witness testified to a high probability that the cocaine purchased on February 15 and that seized on February 21 were of the same origin, the jury could have found further that appellant exercised dominion and control over that seized on February 21 as well. This conclusion could have been buttressed by Spencer's testimony that appellant personally produced a quantity of cocaine on the morning of February 16; by the discovery of scales suitable for weighing drugs in appellant's and his wife's bedroom closet; and by appellant's request after the search that Detective Hartzner leave him "half the stash."

[7] We further hold that the evidence was sufficient to support appellant's conviction on the conspiracy count. "[O]nce the existence of an agreement or common scheme of conspiracy is shown—usually by inferences from relevant and competent circumstantial evidence—slight evidence is all that is required to connect a particular defendant with the conspiracy . . . ." *United States v. Sanchez*, 508 F.2d 388, 392 (5th Cir.), *cert. denied*, 423 U.S. 827, 96 S.Ct. 45, 46 L.Ed.2d 44 (1975) (footnote omitted). Here the evidence was considerably more than slight that appellant, Valdez, and Alfonso had engaged in a common scheme to possess and distribute cocaine. The jury was free to infer, from the frequency of the transactions and amounts of the drug involved, appellant's knowledge and intent that the cocaine he delivered to Valdez would be redistributed. *See United States v. Sin Nagh Fong*, 490 F.2d 527, 530 & n. 3 (9th Cir.), *cert. denied*, 417 U.S. 916, 94 S.Ct. 2618, 41 L.Ed.2d 220 (1974). In such circumstances it is immaterial that appellant did not know the identity of lower links in the chain of distribution. *United States v. Agueci*, 310 F.2d 817, 826–27 (2d Cir. 1962), *cert. denied sub nom. Guippone v. United States*, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963); *United States v. Rich*, 262 F.2d 415, 417–18 (2d Cir. 1959).

V. *Refusal to Declare Mistrial.*

[8, 9] Appellant's final contention is that the district court erred in refusing to declare a mistrial after the following exchange between the government's first witness, Detective Hartzner, and defense counsel with respect to who occupied the house at 3010 West Laurel Street:

> Q: Detective Hartzner, the city directory also lists Melba Rojas as residing at 3010 West Laurel Street doesn't it?
>
> A: I have no knowledge of that, sir.
>
> Q: The city directory also lists Jose Garcia as an occupant of that home does it not, sir?
>
> A: Mr. Antinori, the city directory could possibly have everybody in the city of Tampa, some people are in it and some people aren't. The only one I was concerned with at the time was Mr. Rojas.
>
> Q: That's precisely my point. You only concerned yourself with Gerald Rojas as far as living at that house but you didn't find out everyone who lived at that house have you?
>
> A: *Well, sir, he was the only one at the residence we had information on who was selling cocaine, we didn't have information on Jose Garcia and Melba Rojas, we had information on Gerald Rojas.*

Record Vol. II at 175–76 (emphasis added). Defense counsel immediately moved that the district court strike the last response and admonish the jury to disregard it. The district court did so. Defense counsel also moved for a mistrial, which motion the court denied.

There can be little doubt that Hartzner's statement, although arguably responsive to defense counsel's probing as to why only Gerald Rojas, Sr. was under investigation, smacked of "informant's hearsay" and hence was properly ordered removed from the consideration of the jury. *See, e. g., United States v. Gomez*, 529 F.2d 412, 416–17 (5th Cir. 1976); *United States v. Rodriguez*, 524 F.2d 485, 486–87 (5th Cir. 1975); *United States v. Vosper*, 493 F.2d 433, 437–38 (5th Cir. 1974); *McMillian v. United States*, 363 F.2d 165, 167 (5th Cir. 1966). The question here is whether the trial court's terse admonishment to the jury[3] was sufficient to obviate the need to declare a mistrial.

The general rule is that striking erroneously admitted evidence and admonishing the jury to disregard it serves to cure the error. *United States v. Vosper, supra*, 493 F.2d at 438 & n. 11; *United States v. Troise*, 483 F.2d 615, 618 (5th Cir.), *cert. denied*, 414 U.S. 1066, 94 S.Ct. 574, 38 L.Ed.2d 471 (1973); *Conner v. United States*, 322 F.2d 647 (5th Cir. 1963), *cert. denied*, 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed.2d 178 (1964).

To require a new trial, the prejudicial effect of improper matter, viewed in the context of that particular trial, must not be overwhelmed by evidence of guilt. A significant possibility must exist that, considering the other evidence presented by both the prosecu-

3. The trial court simply told the jury, "Disregard that remark." Record Vol. II at 176.

> tion and the defense, the . . . statement had a substantial impact upon the verdict of the jury.

United States v. Rodriguez, supra, 524 F.2d at 487, *quoting United States v. Arenas-Granada*, 487 F.2d 858, 859 (5th Cir. 1973); *see Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

In the instant case we are confident that Hartzner's statement did not have a substantial impact on the verdict. The other evidence, reviewed above, clearly pointed to appellant as being a large-volume supplier of cocaine. Moreover, the attention of the jury was not again directed to Hartzner's remark. *See United States v. Ratner*, 464 F.2d 169, 173 (5th Cir. 1972); *cf. United States v. Troise, supra*, 483 F.2d at 618 n. 4. "An error that might be prejudicial in a close case does not require reversal when evidence of the defendant's guilt is strong." *United States v. Roland*, 449 F.2d 1281, 1282 (5th Cir. 1971). We hold that the district court did not err in denying appellant's motion for a mistrial.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX 2

U. S. Court of Appeals
FILED
Oct. 1, 1976
Edward W Wadsworth
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3760

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

GERALD ROJAS, SR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING
(OCTOBER 1, 1976)

Before WISDOM and MORGAN, Circuit Judges, and LYNNE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.
ENTERED FOR THE COURT

/s/ Luis R. Morgan
United States Circuit Judge

APPENDIX 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 75-49-CR-T-K

UNITED STATES OF AMERICA,
Plaintiff,

v.

STEVEN CHARLES ALFONSO, RICHARD VALDEZ a/k/a CHICKY VALDEZ and GERALD ROJAS, SR.
Defendants

The Grand Jury charges:

COUNT ONE

From on or about February 8, 1975, and continuously thereafter to February 21, 1975, at Tampa, Florida, in the Middle District of Florida,

STEVEN CHARLES ALFONSO,
RICHARD VALDEZ, a/k/a CHICKY VALDEZ, and
GERALD ROJAS, SR.

the Defendants, wilfully and knowingly did combine, conspire, and confederate and agree together with each other and with diverse other persons to the Grand Jury unknown commit the following offense against the United States, that is, to knowingly and intentionally possess with intent to distribute a controlled substance, to-wit, cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the Defendants and co-conspirators performed the following Overt Acts:

1. On or about February 8, 1975, STEVEN CHARLES ALFONSO met with Kenneth Larsen and Charles Hartzner and discussed selling cocaine to them.

2. On or about February 13, 1975, STEVEN CHARLES ALFONSO and CHICKY VALDEZ sold to Kenneth Larsen and Charles Hartzner one-half ounce of cocaine for $625.00.

3. On or about February 15, 1975, CHICKY VALDEZ advised STEVEN CHARLES ALFONSO that the man who lived at 3010 West Laurel could supply pounds of cocaine to them.

4. On or about February 15, 1975, RICHARD "CHICKY" VALDEZ went into the residence located at 3010 West Laurel and obtained approximately 28 grams of cocaine.

5. On or about February 15, 1975, at 9223 North Brooks, CHICKY VALDEZ and STEVEN CHARLES ALFONSO sold 28 grams of cocaine to Charles Hartzner for $1,200.00.

6. On or about February 21, 1975, GERALD ROJAS, SR., who resides at 3010 West Laurel, had possession of approximately seven ounces of cocaine.

7. On or about February 21, 1975, GERALD ROJAS, SR., had possession of one set of scales.
All in violation of Title 21, United States Code, Section 846.

COUNT TWO

On or about February 13, 1975, at Tampa, Florida, in the Middle District of Florida,

STEVEN CHARLES ALFONSO and
RICHARD VALDEZ a/k/a CHICKY VALDEZ

did knowingly and intentionally possess with intent to distribute a controlled substance, to-wit: approximately one-half ounce of cocaine, all in violation of Title 21, United States Code, Section 841(a)(2) and Title 18, United States Code, Section 2.

COUNT THREE

On or about February 15, 1975, at Tampa, Florida, in the Middle District of Florida,

RICHARD VALDEZ a/k/a CHICKY VALDEZ

did knowingly and intentionally possess with intent to distribute a controlled substance, to-wit: approximately 28 grams of cocaine, all in violation of Title 21, United States Code, Section 841(a)(2) and Title 18, United States Code, Section 2.

COUNT FOUR

On or about February 21, 1975, at Tampa, Florida, in the Middle District of Florida,

GERALD ROJAS, SR.

did knowingly and intentionally possess with intent to distribute a controlled substance, to-wit: approximately seven ounces of cocaine, all in violation of Title 21. United States Code, Section 841(a)(2) and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Merlin R. Ledgard
Foreman

JOHN L. BRIGGS
United States Attorney

By: /s/ D. Frank Winkles
D. FRANK WINKLES
Assistant United States Attorney

Supreme Court, U. S.
FILED
DEC 23 1976
MICHAEL RODAK, JR., CLERK

No. 76-593

In the Supreme Court of the United States

OCTOBER TERM, 1976

GERALD ROJAS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-593

GERALD ROJAS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner complains that the district court did not conduct a sufficiently thorough *voir dire* examination of prospective jurors.

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possession of cocaine with intent to distribute and conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(2), and 846. He was sentenced to concurrent terms of 10 years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (537 F. 2d 216; Pet. App. A-1 to A-8).

The facts are fairly summarized by the court of appeals. Petitioner was the source of cocaine for at least two sales, one on February 15, 1975, and the other the next day. The first sale was made to Florida undercover

policemen; the second was to other purchasers in the presence of an informant. In a search of petitioner's house authorized by a warrant, police officers found seven ounces of cocaine hidden in a chair.

Pursuant to Fed. R. Crim. P. 24, the district court solicited questions from both the prosecutor and defense counsel, then conducted the *voir dire* of prospective jurors itself. The court read the indictment to the panel and asked (1) whether any juror knew or was a client of any of the attorneys in the case; (2) whether any of the jurors knew the petitioner; (3) whether any members of the jurors' immediate family knew the lawyers of petitioner; (4) whether they knew any of the facts of the case or had read anything in the papers or seen anything on television concerning the case; and (5) whether any of them was now or ever had been employed by the government or a law enforcement agency. On two occasions the court asked if anyone on the panel knew of any reason why he could not serve and give both the government and the defendant a fair and impartial trial.

Petitioner objects to the court's refusal to ask several questions from his pre-trial submission of 69 queries concerning two areas of possible juror bias. He first objects to the court's refusal to inquire whether a juror would " 'believe that merely because one is a law enforcement officer he will always tell the truth, or do you believe that he may intentionally misrepresent something, exaggerate or not disclose when there is a duty to disclose, like any other witness who may not want to be completely accurate?' " (Pet. 3-4).

The conduct of the *voir dire* is entrusted to the sound discretion of the trial court. *Ristaino* v. *Ross*, 424 U.S. 589, 594. Whether that discretion was abused in a particular case is not a question warranting the attention of this Court. Nor was there error here; the trial court

was under no obligation to pose the question requested by petitioner. It is proper for the court to ask, when requested to do so in proper form, whether jurors are inclined to give special weight to the testimony of a police officer merely because he is a police officer. *Sellers* v. *United States*, 271 F. 2d 475 (C.A. D.C.); see also *Chavez* v. *United States*, 258 F. 2d 816, 819 (C.A. 10), certiorari denied, 359 U.S. 916. The question petitioner tendered, however, is improper. It is argumentative and apparently attempts to implant in the mind of a prospective juror the belief that a police officer would not want to testify truthfully.[1]

Petitioner also contends that the district court should have asked a series of questions (Pet. 4) allegedly designed to elicit jurors' attitudes toward drug-related crimes. The feelings of the jurors about the type of crime at issue do not, however, ordinarily call for special inquiry. An impartial jury can generally be obtained without an inquiry into every prejudice feared by the defendant. *Ristaino* v. *Ross*, *supra*, 424 U.S. at 595. The court of appeals here held that the district court had relied on " 'careful though general questions pertaining to the possibility of bias' " (Pet. App. A-4 to A-5,

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[1]Even if petitioner were entitled to questions concerning the credibility of police officers, refusal to ask proposed questions on that matter does not require reversal unless the testimony of a police officer might have had a decisive influence. *Brown* v. *United States*, 338 F. 2d 543, 545 (C.A. D.C.); *United States* v. *Jackson*, 448 F. 2d 539, 542 (C.A. 5). The principal witnesses against petitioner were an undercover police officer, a co-defendant cooperating with the prosecution, and an informant. Because the co-defendant had been a witness to everything the police officer observed, and the informant had been a witness to petitioner's distribution of cocaine, this case does not involve reliance on the uncorroborated testimony of a police officer (Pet. App. A-3). For these reasons the decision below does not, as suggested by petitioner (Pet. 7-8), conflict with the decision of the District of Columbia Circuit in *Brown*, *supra*.

quoting from *United States* v. *Eastwood*, 489 F. 2d 818, 820 (C.A. 5)). Under the circumstances the refusal to ask the proffered questions did not affect the essential fairness of petitioner's trial and was not an abuse of discretion.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[2]A post-trial affidavit by Bobby Hornsby, the foreman of the jury, states that Hornsby had supported an organization to help people with drug problems (Pet. App. A-4). Petitioner asserts that if he had known this in advance of trial he would have exercised a peremptory challenge against Hornsby. The court of appeals pointed out, however, that there is no reason to conclude that Hornsby harbored bias against petitioner or those charged with drug offenses (Pet. App. A-4); indeed, as petitioner implicitly concedes by saying that he would have exercised a peremptory challenge against Hornsby, a challenge for cause would not have been well taken. The primary purpose of the *voir dire* is to ensure that the jurors are unbiased. The district court is not required to ask questions simply because the answers, although insufficient to show bias, may provide information that will guide counsel in exercising peremptory challenges; if it were required to ask such questions, essentially for counsel's information, *voir dire* could be interminable.